



DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 274a

[CIS No. 2722-22; DHS Docket No. USCIS-2022-0008]

RIN 1615-AC66

Asylum Application, and Employment Authorization for Applicants;

Implementation of Vacatur

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: This final rule removes changes to regulatory text resulting from two final rules issued in June 2020, which were vacated by a Federal district court in February 2022. This final rule implements the vacatur by removing certain regulatory text governing asylum applications, interviews, and eligibility for employment authorization and an employment authorization document (EAD) based on a pending asylum application. It also reinserts various regulatory provisions as they appeared prior to the effective dates of the two final rules issued in June 2020.

DATES: This rule is effective on February 7, 2022, as a result of the Federal district court's vacatur.

FOR FURTHER INFORMATION CONTACT: Rená Cutlip-Mason, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588-0009; telephone (240) 721-3000 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Background and Basis for Removal of Regulations

In June 2020, the U.S. Department of Homeland Security (DHS) issued two final rules (June 2020 EAD rules, collectively) titled, *Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications* (Timeline Repeal rule) and *Asylum Application, Interview, and Employment Authorization for Applicants* (Broader Asylum EAD rule), respectively.¹ The Timeline Repeal rule eliminated two regulatory provisions that required U.S. Citizenship and Immigration Services (USCIS) to adjudicate initial EAD applications filed by asylum applicants within 30 days of receipt and that renewal EAD applications from asylum applicants must be received by USCIS 90 days prior to the expiration of the employment authorization. The Timeline Repeal rule went into effect on August 21, 2020. The Broader Asylum EAD rule made a number of changes to DHS's regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application, including: extending the waiting period before asylum applicants may apply for an EAD from 180 days, not including delays caused or requested by an applicant, to 365 calendar days; requiring applicants for all initial or renewal applications for employment authorization to submit biometrics at a scheduled biometrics services appointment; and instituting bars to EAD eligibility for asylum applicants with certain criminal convictions, who failed to file for asylum within 1 year of entry into the United States, or who had entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry. The Broader Asylum EAD rule became effective on August 25, 2020. On September 11, 2020, in *Casa de Md., Inc. v. Mayorkas*, the U.S. District Court for the District of Maryland issued a partial preliminary injunction of both the Timeline Repeal rule and the Broader Asylum EAD rule with respect to members of plaintiff organizations Casa de Maryland, Inc. (CASA)

¹ See 85 FR 37502 (June 22, 2020); 85 FR 38532 (June 26, 2020).

and Asylum Seeker Advocacy Project (ASAP).² On February 7, 2022, the U.S. District Court for the District of Columbia fully vacated both rules in *Asylumworks v. Mayorkas*, concluding that Chad Wolf was not lawfully serving as Acting DHS Secretary when the two rules were enacted, and that Secretary Mayorkas' ratification of the DHS Timeline Repeal Rule did not cure the defect that Chad Wolf's unlawful tenure created.³ DHS did not seek further review on appeal. This final rule implements the vacatur of the Timeline Repeal rule and the Broader Asylum EAD rule. This rule removes from the *Code of Federal Regulations* (CFR) the regulatory text that DHS promulgated in the Timeline Repeal rule and the Broader Asylum EAD rule and restores the regulatory text to appear as it did prior to the effective dates of the June 2020 EAD rules in August 2020.

Because it implements the district court's vacatur of the Timeline Repeal rule and the Broader Asylum EAD rule and restores the regulatory text to correctly reflect the regulatory text that predated the June 2020 EAD rules,⁴ DHS is not required to provide notice and comment or delay the effective date of this final rule. As a result of the rules being vacated, the changes made by the Timeline Repeal rule and the Broader Asylum EAD rule do not have any legal effect. Moreover, the good cause exception permits DHS to bypass otherwise applicable requirements of notice and comment and a delayed effective date. Notice and comment requirements and a delayed effective date are unnecessary for implementing the vacatur and would be impracticable and contrary to the

² See *Casa de Md., Inc. v. Mayorkas*, 486 F. Supp. 3d 928 (D. Md. 2020) (originally called *Casa de Md., Inc. v. Wolf*).

³ See *Asylumworks v. Mayorkas*, No. 20-CV-3815, 2022 WL 355213 (D.D.C. Feb. 7, 2022).

⁴ On August 20, 2021, the Department of Justice (DOJ) and DHS published a notice of proposed rule making titled Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers. See 86 FR 46906 (Aug. 20, 2021). Subsequently, on March 29, 2022, DOJ and DHS published the Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers interim final rule (Asylum Procedures IFR). See 87 FR 18078 (Mar. 29, 2022). The Asylum Procedures IFR made superseding changes to 8 CFR 208.4(c) and 8 CFR 208.9(d) & (e). As a result of these changes to 8 CFR 208.4(c) and 8 CFR 208.9(d) & (e) superseding the June 2020 EAD rules, the changes made by the Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers rule will be retained and not amended by this rule.

public interest in light of the agency’s immediate need to implement the now-effective final judgment. *See* 5 U.S.C. 553(b)(B), (d). DHS has concluded that each of those three reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest—independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

II. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501–3512, DHS must submit to the Office of Management and Budget (OMB) for review and approval any reporting requirements inherent in a rule, unless they are exempt. Please see the accompanying PRA documentation for the full analysis.⁵ Table 1 below lists all collections of information impacted by the vacatur.⁶

Table 1. Summary of Forms					
Form	Form Name	Change	General Purpose of Form	General Categories Filing	Nexus to the Broader Asylum EAD rule
I-765, I-765WS	Application for Employment Authorization	Updates-removes questions and instructions related to (c)(8) biometrics and 365 calendar day filing clock	Certain foreign nationals who are in the United States may file Form I-765, Application for Employment Authorization, to request employment authorization and an Employment Authorization Document (EAD). Other	Initial EAD: An EAD issued to an eligible applicant for the first time under a specific eligibility category. Renewal EAD: An EAD issued to an eligible applicant after the expiration of a previous EAD issued under the same category.	Asylum applicants seeking employment authorization through the (c)(8) category are no longer required to appear at a USCIS Application Support Center (ASC) for biometrics submission, nor are applicants required to submit the \$85

⁵ *See* Pub. L. 104-13, 109 Stat. 163 (May 22, 1995) codified at 44 U.S.C. 3501 et seq.

⁶ Only the Broader Asylum EAD rule (RIN 1615-AC27) impacted information collections. There were no information collection impacts from the Timeline Repeal rule (RIN 1615-AC19).

Table 1. Summary of Forms					
Form	Form Name	Change	General Purpose of Form	General Categories Filing	Nexus to the Broader Asylum EAD rule
			foreign nationals whose immigration status authorizes them to work in the United States without restrictions may also use Form I-765 to apply to U.S. Citizenship and Immigration Services (USCIS) for an EAD that shows such authorization.	Replacement EAD: An EAD issued to an eligible applicant when the previously issued EAD was lost, stolen, damaged, or contains errors, such as a misspelled name.	biometric services fee. Applicants for asylum need not wait 365 calendar days to apply for employment authorization, and can submit applications for employment authorization 150 days after filing their asylum application.
I-589	Application for Asylum and for Withholding of Removal.	Updates-removes instructions related to (c)(8) biometrics and 365 calendar day filing clock	This form is used to apply for asylum in the United States and for withholding of removal (formerly called "withholding of deportation"). This application may also be used to apply for protection under the Convention Against Torture.	Asylum - To qualify for asylum, the applicant must establish that they are a refugee who is unable or unwilling to return to his or her country of nationality, or last habitual residence if they have no nationality, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a	Applicants for asylum need not wait 365 calendar days to apply for employment authorization, and can now submit applications for employment authorization 150 days after filing their asylum application.

Table 1. Summary of Forms					
Form	Form Name	Change	General Purpose of Form	General Categories Filing	Nexus to the Broader Asylum EAD rule
				particular social group, or political opinion. Withholding of Removal and Deferral of removal Under Convention Against Torture - The asylum application is also considered to be an application for withholding of removal under section 241(b)(3) of the INA, as amended. It may also be considered an application for withholding of removal under the Convention Against Torture.	

To conform with the requirements set forth by the PRA, USCIS requested and received emergency approval from OMB to take the following actions on certain collections of information as required by the vacatur of the Broader Asylum EAD Rule. USCIS is updating the information collections in accordance with the vacatur of the Broader Asylum EAD rule.

USCIS Form I-765; I-765WS, (OMB Control Number 1615-0040)

Overview of information collection:

- (1) Type of Information Collection Request: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Application for Employment Authorization; I-765 Worksheet.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-765; I-765WS; USCIS.

(4) Affected public who were asked or required to respond, as well as a brief abstract:
Primary: Individuals or households. USCIS uses Form I-765 to collect information needed to determine if a noncitizen is eligible for employment authorization and an initial EAD, a replacement EAD, or a renewal EAD upon the expiration of a previous EAD under the same eligibility category. Noncitizens in many immigration statuses are required to possess an EAD as evidence of employment authorization.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: the estimated total number of respondents for the information collection I-765 paper filing is 2,178,820 and the estimated hour burden per response is 4.50 hours; the estimated total number of respondents for the information collection I-765 online filing is 107,180 and the estimated hour burden per response is 4 hours; the estimated total number of respondents for the information collection I-765WS is 302,000 and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the information collection biometrics submission is 302,535 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection passport photos is 2,286,000 and the estimated hour burden per response is 0.5 hours.

(6) An estimate of the total public burden (in hours) associated with the collection:
The total estimated annual hour burden associated with this collection of information is 11,881,376 hours.

- (7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$400,895,820.

USCIS Form I-589, (OMB Control Number 1615-0067)

Overview of information collection:

- (1) Type of Information Collection Request: Revision of a Currently Approved Collection.
- (2) Title of the Form/Collection: Application for Asylum and for Withholding of Removal.
- (3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-589; USCIS.
- (4) Affected public who were asked or required to respond, as well as a brief abstract:
Primary: Individuals or households. USCIS and Executive Office for Immigration Review (EOIR) use the data collected on the Form I-589 in the course of adjudicating eligibility of persons applying for asylum and for withholding of removal. Under section 208(a)(1) of the Immigration and Nationality Act (INA), any noncitizen who is physically present in the United States, or at a land border or port of entry, may apply for asylum regardless of such noncitizen's status. In the first instance, USCIS asylum officers adjudicate applications filed by noncitizens who are not subject to removal proceedings, or who have not yet been placed in removal proceedings, in accordance with 8 CFR 208.2(a). EOIR immigration judges adjudicate asylum applications filed by noncitizens in removal proceedings, in accordance with 8 CFR 1208.2(b). The form serves the purpose of standardizing the application and ensuring that applicants provide the required information necessary for assessing eligibility.

USCIS also uses the Form I-589 to serve as an alternate application for evidence of employment authorization for individuals granted asylum, eliminating their need to file a separate Form I-765, Application for Employment Authorization (OMB No. 1615-0040) with USCIS if, after being granted asylum, they wish to receive an Employment Authorization Document (EAD) containing both evidence of employment authorization and identity. The Form I-589 collects the same biographic information as that collected by the Form I-765. In cases where asylum is granted, the biographic information contained on the Form I-589 can also be used to generate the EAD.

- (5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-589 paper filing is 85,500 and the estimated hour burden per response is 12 hours; the estimated total number of respondents for the information collection I-589 online filing is 28,500 and the estimated hour burden per response is 11 hours; the estimated total number of respondents for the information collection biometrics submission is 110,000 and the estimated hour burden per response is 1.17 hours.
- (6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 1,468,200 hours.
- (7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$46,968,000.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements

Accordingly, DHS amends parts 208 and 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Amend § 208.3 by revising paragraph (c)(3) to read as follows:

§ 208.3 Form of application.

* * * * *

(c) * * *

(3) An asylum application that does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a)(1) of this section is incomplete. The filing of an incomplete application shall not commence the 150-day period after which the applicant may file an application for employment authorization in accordance with § 208.7. An application that is incomplete shall be returned by mail to the applicant within 30 days of the receipt of the application by the Service. If the Service has not mailed the incomplete application back to the applicant within 30 days, it shall be deemed complete. An application returned to the applicant as incomplete shall be resubmitted by the applicant with the additional information if he or she wishes to have the application considered;

* * * * *

3. Revise § 208.7 to read as follows:

§ 208.7 Employment authorization.

(a) *Application and approval.* (1) Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a) of this chapter to request employment authorization. Except in the case of an alien whose asylum application has been recommended for approval, or in the case of an alien who filed an asylum application prior to January 4, 1995, the application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§ 208.3 and 208.4 has been received. In the case of an applicant whose asylum application has been recommended for approval, the applicant may apply for employment authorization when he or she receives notice of the recommended approval. If an asylum application has been returned as incomplete in accordance with § 208.3(c)(3), the 150-day period will commence upon receipt by the Service of a complete asylum application. An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization. If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied. If the asylum application is not so denied, the Service shall have 30 days from the date of filing of the request employment authorization to grant or deny that application, except that no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application filed on or after April 1, 1997.

(2) The time periods within which the alien may not apply for employment authorization and within which USCIS must respond to any such application and within

which the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with §§ 208.3 and 208.4. Any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing. Such time periods shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.

(3) The provisions of paragraphs (a)(1) and (a)(2) of this section apply to applications for asylum filed on or after January 4, 1995.

(4) Employment authorization pursuant to § 274a.12(c)(8) of this chapter may not be granted to an alien who fails to appear for a scheduled interview before an asylum officer or a hearing before an immigration judge, unless the applicant demonstrates that the failure to appear was the result of exceptional circumstances.

(b) *Renewal and termination.* Employment authorization shall be renewable, in increments to be determined by USCIS, for the continuous period of time necessary for the asylum officer or immigration judge to decide the asylum application and, if necessary, for completion of any administrative or judicial review.

(1) If the asylum application is denied by the asylum officer, the employment authorization shall terminate at the expiration of the employment authorization document or 60 days after the denial of asylum, whichever is longer.

(2) If the application is denied by the immigration judge, the Board of Immigration Appeals, or a Federal court, the employment authorization terminates upon the expiration of the employment authorization document, unless the applicant has filed an appropriate request for administrative or judicial review.

(c) *Supporting evidence for renewal of employment authorization.* In order for employment authorization to be renewed under this section, the alien must request employment authorization in accordance with the form instructions. USCIS may require that an alien establish that he or she has continued to pursue an asylum application before an immigration judge or sought administrative or judicial review. For purposes of employment authorization, pursuit of an asylum application is established by presenting one of the following, depending on the stage of the alien's immigration proceedings:

(1) If the alien's case is pending in proceedings before the immigration judge, and the alien wishes to continue to pursue his or her asylum application, a copy of any asylum denial, referral notice, or charging document placing the alien in such proceedings;

(2) If the immigration judge has denied asylum, a copy of the document issued by the Board of Immigration Appeals to show that a timely appeal has been filed from a denial of the asylum application by the immigration judge; or

(3) If the Board of Immigration Appeals has dismissed the alien's appeal of a denial of asylum, or sustained an appeal by the Service of a grant of asylum, a copy of the petition for judicial review or for habeas corpus pursuant to section 242 of the Act, date stamped by the appropriate court.

(d) In order for employment authorization to be renewed before its expiration, the application for renewal must be received by the Service 90 days prior to expiration of the employment authorization.

4. Revise § 208.10 to read as follows:

§ 208.10 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprint processing.

Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an interview. Failure to comply with fingerprint processing requirements without good cause may result in dismissal of

the application or waiver of the right to an adjudication by an asylum officer. Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the USCIS by the applicant prior to the date of mailing in accordance with section 265 of the Act and regulations promulgated thereunder, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment. Failure to appear at the interview or fingerprint appointment will be excused if the applicant demonstrates that such failure was the result of exceptional circumstances.

PART 274a – CONTROL OF EMPLOYMENT OF ALIENS

5. The authority citation for part 274a is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599; Title VII of Pub. L. 110-229, 122 Stat. 754; Pub. L. 115-218, 132 Stat. 1547; 8 CFR part 2.

6. Amend § 274a.12 by:

- a. In paragraph (c) introductory text, removing the phrase “, unless otherwise provided in this chapter”; and
- b. Revising paragraphs (c)(8) and (11).

The revisions read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR part 208, whose application:

(i) Has not been decided, and who is eligible to apply for employment authorization under § 208.7 of this chapter because the 150-day period set forth in that section has expired. Employment authorization may be granted according to the

provisions of § 208.7 of this chapter in increments to be determined by the Commissioner and shall expire on a specified date; or

(ii) Has been recommended for approval, but who has not yet received a grant of asylum or withholding or deportation or removal;

* * * * *

(11) Except as provided in paragraphs (b)(37) and (c)(34) of this section and § 212.19(h)(4) of this chapter, an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.

* * * * *

7. Amend § 274a.13 by revising paragraphs (a)(1) and (2) and (d)(3) to read as follows:

§ 274a.13 Application for employment authorization.

(a) * * *

(1) The approval of applications filed under 8 CFR 274a.12(c), except for 8 CFR 274a.12(c)(8), are within the discretion of USCIS. Where economic necessity has been identified as a factor, the alien must provide information regarding his or her assets, income, and expenses.

(2) An initial employment authorization request for asylum applicants under 8 CFR 274a.12(c)(8) must be filed on the form designated by USCIS in accordance with the form instructions. The applicant also must submit a copy of the underlying application for asylum or withholding of deportation, together with evidence that the application has been filed in accordance with 8 CFR 208.3 and 208.4. An application for an initial employment authorization or for a renewal of employment authorization filed in relation to a pending claim for asylum shall be adjudicated in accordance with 8 CFR 208.7. An application for renewal or replacement of employment authorization submitted

in relation to a pending claim for asylum, as provided in 8 CFR 208.7, must be filed, with fee or application for waiver of such fee.

* * * * *

(d) * * *

(3) *Termination.* The period authorized by paragraph (d)(1) of this section will automatically terminate the earlier of up to 180 days after the expiration date of the Employment Authorization Document (Form I-766), or upon issuance of notification of a decision denying the renewal request. Nothing in paragraph (d) of this section will affect DHS's ability to otherwise terminate any employment authorization or Employment Authorization Document, or extension period for such employment or document, by written notice to the applicant, by notice to a class of aliens published in the **Federal Register**, or as provided by statute or regulation including 8 CFR 274a.14.

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§ 274a.14 [Amended]

8. Amend § 274a.14 by:

- a. Adding “or” at the end of paragraph (a)(1)(ii);
- b. Removing the “; or” and adding in its place a period at the end of paragraph (a)(1)(iii); and
- c. Removing paragraph (a)(1)(iv).

Alejandro N. Mayorkas,

Secretary of Homeland Security.

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